No. 3273.

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

ON APPEAL FROM THE DISTRICT COURT OF THE DISTRICT OF IDAHO.

Mathilde Cardoner,
Appellant,

vs.

Eugene R. Day, et al.,
Appellees.

REPLY BRIEF OF APPELLANT.

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REPLY BRIEF OF APPELLANT.

Preliminary.

Three briefs have been filed by appellees, one by appellee Harry R. Allen, another by Harry L. Day and Jerome J. Day, and a third by the remainder of the defendants. The brief filed in behalf of Allen will not be further referred to in this brief. The brief filed by Messrs. Babb and Smith in behalf of Harry L. Day and Jerome J. Day will be referred to as appellees' brief number three, and the brief filed by Messrs. Beale

and Wourms in behalf of a large number of the other defendants will be referred to as appellees' brief number two.

There are certain legal propositions laid down in appellant's original brief which are in the main either agreed to or not disputed by the appellees in their brief number two, but some propositions stated in brief number three would indicate that the theory upon which this case was tried in the court below was departed from. A large portion of brief number two (pages 13-22) is taken up in discussing wherein appellant failed to establish the allegations of her bill of complaint. In reply to this it is sufficient to say that in the allegations affecting the merits of the case, that the defendant Eugene R. Day failed to make the necessary disclosures due to appellant on account of their fiduciary relationship when he purchased her interest in the Hercules mine, and failed to give a price that approximated near the actual value of the property, and such appeal contained the other necessary formal allegations (and of this there is no dispute), it would be sufficient notwithstanding there may have been charges of actual fraud not established by the evidence.

Brooks v. Martin, 69 U. S. 70.

Of the ten assignments of error on which this appeal is based, it is not thought necessary to the proper presentation of appellant's case to add anything to what has heretofore been said with reference to assignment

number one and assignments numbers ten and eleven, which deal with the first, fourth and fifth final issues, but this reply brief will be confined to the two final issues, numbers three and four, and questions raised by appellees.

SECOND FINAL ISSUE.

Did the defendant Eugene R. Day prior to purchasing from plaintiff her interest in the partnership property of the Hercules Mining Company communicate to her all material facts known to him and obtained by him by reason of the position he occupied as managing partner of said enterprise or did he conceal from her any such material facts so shown to him, and which information was not known to her and which was necessary to enable her to form a sound judgment as to the full value of the Hercules Mining property at the time of such sale and that all such disclosures made prior to such purchase as under the circumstances the law required of said Eugene R. Day to make to the plaintiff prior to the execution of the deed and contract conveying said property to the defendant Eleanor Day Boyce?

THIRD FINAL ISSUE.

Did the price paid for appellant's one-sixth interest in the Hercules mining property, to-wit, $350,000, approximate reasonably near its value?

BRIEF OF THE ARGUMENT.

Point One.

The opinion of the trial court filed in a cause is not findings of ultimate facts.

Authorities:

Yorke v. Washburn, 129 Fed. (8th Circuit) 564;

Dickinson v. Bank, 16th Wallace 250.

Point Two.

A party cannot assume an attitude in the Appellate Court inconsistent with that taken by him before the trial court, and the parties are restricted to the theory upon which the case was prosecuted or defended and determined in the trial court.

Authorities:

3 C. J. P. 718, and cases cited from all courts, both federal and state.

Point Three.

A suit in equity on appeal to the United States Circuit Court of Appeals from a United States District Court is tried *de novo* on both law and facts.

Authorities:

Thrallman v. Thomas, 111 Fed. 277;

Silver Mining Co. v. U. S., 175 U. S. 463;

Blaze v. Garlington, 92 U. S. 1;

Waterloo Mining Co. v. Doe, 82 Fed. 45;

Van Idenstine v. National Discount Co., 172 Fed. 518;

Bush v. Bronson, 248 Fed. 619;
T. & P. Railway Co. v. Railroad Commission, 232 U. S. 338;
Washington Security Co. v. United States, 234 U. S. 76.

POINT FOUR.

When the conclusion reached by the trial court in an equity case is clearly wrong, or in case he makes a serious mistake in the consideration of evidence, the case will be reversed.

Authorities:

Same as under Point Three.

POINT FIVE.

The burden of proof is upon a managing partner who purchases a copartner's interest in partnership property to show that the purchaser had disclosed to the seller all the information known to him or in his possession, and that the buyer paid a price that approximated reasonably near the actual value of the property.

Authorities:

Brooks v. Martin, 2 Wallace 70;
Perry on Trusts, secs. 194, 195 to 206;
Elliot on Contracts, sec. 74;
Rowley on Partnership, 242, 400;
Nelson v. Matsch, Am. Cas. 1912, D 1124 and note;
Pomeroy's Equity Jur., sec. 958.

Point Six (Fact).

The testimony in this case does not establish that Eugene R. Day, the managing director of the Hercules Mining Company, disclosed to Mrs. Cardoner, the seller, such information as he had in his possession and which was necessary for her to possess in order to form a sound judgment as to the value of the property sold.

Point Seven.

It is incumbent on a managing director to show by convincing evidence, where he has purchased the interest of a copartner in partnership property, that the seller had full information and complete understanding of all the facts concerning the property and the transaction itself, and that the seller gave a perfectly free consent and that the price paid was fair and adequate, and that the buyer made to the seller a perfectly honest and complete disclosure of all the knowledge concerning the property possessed by himself or which he might with reasonable diligence have possessed and that he has obtained no undue or inequitable advantage in the purchase.

Authorities: Same as under Point Five.

Point Eight.

The ordinary rules governing cases of fraud in transactions between parties dealing at arms' length, or between whom no fiduciary relations exist, do not apply in dealings between partners, and especially in cases

where managing partners purchase the interest of a copartner in partnership property.

Brooks v. Martin, 69 U. S. 70;
2nd Pomeroy's Equity Jur., 4th ed., secs. 955, 956, 957, 958, 959 and 963;
Cunningham v. Pettigrew, 169 Fed. 335;
Thorne v. Brown, 63 W. Va. 603;
Miller v. Ferguson, 107 Va. 249, 122 Am. St. Rep. 840, 13 Ann. Cases 138;
Goldsmith v. Koopman, 152 Fed. 173;
Byrne v. Jones, 159 Fed. 321.

POINT NINE.

The rule that where a person conducts an independent investigation he cannot rely on the representation of the purchaser does not apply in cases where fiduciary relations exist, and this is especially true in cases where a managing partner purchases property from a copartner who has confidence in his integrity.

Authorities: Same as under Point Eight.

POINT TEN (FACT).

Mrs. Cardoner conducted no independent investigation from which she did or could determine facts upon which she could base a sound judgment as to the value of the property sold; nor was she advised by any disinterested person capable of giving her such information; and such information was peculiarly in the possession and under the control of Eugene R. Day, the managing partner who purchased her property.

Point Eleven (Fact).

The three hundred fifty thousand dollars paid by Eugene R. Day to Mrs. Mathilda Cardoner for the latter's interest in the Hercules mine and other properties of the Hercules Mining Company did not approximate reasonably near to the value of said property, nor is there substantial evidence upon which to base such ultimate fact.

Point Twelve (Fact).

The appellees did not establish by any evidence that was clear and convincing that Eugene R. Day paid the sum of money approximating the reasonable value of Mrs. Cardoner's interest in the Hercules mining properties when he purchased the same.

Point Thirteen (Fact).

The evidence, according to the great weight, establishes that the value of the Hercules mine was much greater than the basis upon which its value was estimated when Eugene R. Day purchased the interest of Mathilda Cardoner, and the three hundred fifty thousand dollars consideration paid for said interest was grossly inadequate.

Point Fourteen.

The sale of the one-sixteenth interest in the Hercules mine to Eugene R. Day while he was administrator of the estate of Darnian Cardoner was void.

Authorities:

Michond v. Girod, 4 Howard 502.

ARGUMENT.

I.

Counsel for appellees seem to think that the opinion of the trial court contained findings of fact and conclusions of law binding upon the parties. We do not so understand the law. No findings or conclusions were made in this case. (Appellees' brief No. 3, p. 83.)

York v. Washburn, 129 Fed. 564;
Dickinson v. Bank, 16 Wallace 250.

The same contention is made at page 35 of their brief No. 2. This case is on trial *de novo*, but certain weight is given to the decision of the trial court to which reference will be hereinafter made.

II.

In appellees' brief No. 2, at page 35, under the title, "FINDINGS," the contention is made that the findings of the court were based upon "uncontradicted facts and testimony that greatly preponderated in favor of appellees," and that such being the case, this court would be bound thereby. If the above conditions exist, this court is bound by the decision of that court. But this suit being in equity is tried *de novo* upon the whole record. It is true findings of the trial court when made are given consideration upon appeal, but they are by no means conclusive. The following are some of the cases upon this proposition:

"Findings of fact are not conclusive, but persuasive."

Thrallman v. Thomas, 111 Fed. 277.

"In an equity suit on appeal the case is tried *de novo* on both law and facts."

Silver Mining Co. v. United States, 175 U. S. 463 *et seq.;*

Blaze v. Garlington, 92 U. S. 1.

"On an appeal in an equity case, findings of fact made by the court below are entitled to some weight, but are not binding on the appellate court. The whole case is before the latter court, and it is bound to decide the same, so far as it is in a condition to be decided, on its merits."

Waterloo Mining Co. v. Doe, 82 Fed. 45.

"In an equity action the appellate court must weigh the evidence and determine whether on such evidence the decree is right."

Van Iderstine v. National Discount Co., 174 Fed. 518.

"The findings of the trial judge is entitled to consideration, and unless clearly against the weight of the evidence that exist by some application of the law, will not be disturbed on appeal. On the other hand, if the finding is clearly against the weight of the evidence, the appellate court in a procedure in equity will reverse it, as on appeal the facts as well as the law are open to consideration."

Bush v. Bronson, 248 Fed. 383.

"The conclusions of the trial judge are accepted by us as correct unless the evidence is found to preponderate decidedly against those conditions."

Estep v. Kentland etc. Co., 239 Fed. 619.

The Supreme Court of the United States has laid down the following rule:

> "Findings of fact concurred in by two lower courts will not be disturbed on appeal by the Supreme Court in an equity case unless clearly erroneous."
>
> Texas & Pacific Ry. Co. v. Railroad Commission, 232 U. S. 338;
>
> Washington Security Co. v. United States, 234 U. S. 76.

It seems to us that the Supreme Court of the United States, in laying down the rule last mentioned, intends that the Circuit Court of Appeals shall also pass upon the facts as well as the law, and determine the case upon the merits, irrespective of the action of the trial court, or else the rule would not be stated to the effect: "Where two lower courts pass upon the facts," the Supreme Court will not disturb it unless clearly erroneous. If this court should accept the facts found by the trial court, certainly but one court would be passing thereon.

III.

There is some attempt on the part of appellees in their brief No. 3 to change the theory on which this case was tried in the court below, as shown by point 3, at page 114, to the effect that "a transaction cannot be appealed on the ground of property of alleged fiduciary relations where the complaining party conducted an independent investigation, acted through her own

agent, consulted her friends, and did not rely upon the fiduciary to furnish information."

We have read each of the cases cited under this point and not one of them, with the exception of Colton v. Stanford, 23 Pacific 16, had any reference to contracts where fiduciary relationship was concerned. In the case just mentioned Mrs. Colton had sold her interests in large properties to the partner of her husband. She had especially selected expert accountants, lawyers of high standing and ability, and had made a thorough investigation of all the properties. She had further stated that she had absolutely no confidence in anything that her partners might say to her and would believe nothing they would tell her. That she not only had access to all information of the partnership, including its books, but that she availed herself of the privilege of having the property and accounts thoroughly examined and passed upon by competent persons acting for her. That she received full value of the property sold and all information in connection therewith had been disclosed to her. Under this state of facts it was held that the contract would not be rescinded. The conditions do not apply to this case.

We call the court's attention to the following quotation from the opinion of the trial court, beginning at page 1381 of the record:

"Finally, can a reason be found in the fact that Day was, and for a long time had been, the manager of the mine, for holding the sale voidable? In this aspect we have the case of an agent dealing with his principal touching property to which the agency relates.

Under what limitations or subject to what conditions could he make a valid purchase? His position doubtless gave him peculiar opportunities for knowing all the facts and estimating the reasonable probabilities, and it was his duty to deal fairly with the plaintiff. He could lawfully purchase her interest, but before doing so he was bound to disclose to her the facts and conditions which had come to his knowledge as manager, bearing upon the value of the property. He could take no advantage by misrepresentation, concealment or omission to disclose. He was not required to express himself relative to matters merely of speculation or surmise, but in so far as he chose to give an opinion he was bound to act honestly and in good faith. Byrnes v. Jones, 159 Fed. 321. In a sense, of course, the two parties could not be put upon the same footing. Personally, the plaintiff had had no practical experience in mining, and presumably, therefore, was less competent than Day to form an intelligent opinion or to speculate upon the ultimate question of the commercial value of the property."

From the above quotation it will be seen that this case was tried in the court below upon the theory that the fiduciary relationship of partner and managing partner existed between these parties and that the law applicable thereto should apply. Not only did the court take this view of it, but likewise counsel took the same view, as will appear from the record at pages 558 to 569, and attention is especially called to the statement of Mr. Beale at page 565, in which he quotes from the case of Brooks v. Martin, 69 U. S. 70, as being authority upon which this case should be based, and this case having been tried below upon this theory,

it is too late to change the theory in the Appellate Court.

3 C. J., p. 718, and cases cited from all courts, both federal and state.

The Effect of an Adverse Decision by the Trial Court.

The appellant is confronted in the beginning with an adverse decision of the trial court upon the facts and especially upon the two propositions laid down in Brooks v. Martin, 2 Wallace 70-82, to the effect that full disclosures as to the partnership affairs were made by Eugene R. Day to Mrs. Cardoner, and that a consideration approximating near the reasonable value of her property was paid therefor.

It is our understanding that the evidence in this case and others like it must be such as to establish the above facts: that the burden was on the appellees to establish such facts; that appellees must clear the transaction of every shadow of suspicion, or at least establish these facts by clearly convincing testimony. (Perry on Trusts, sec. 109.) Indeed this very section of Perry on Trusts is quoted as the law applicable to the case in appellees' brief No. 2 at page 49, as follows:

> "But there are exceptions to the rule, and a trustee may buy from the *cestui que* trust, provided there is a distinct and clear contract ascertained after a zealous and scrupulous examination of all the circumstances; that the *cestui que* trust intended the trustee to buy and there is a fair consideration and no fraud, no concealment, no

advantage of information taken by the trustee acquired by him in the character of trustee."

But appellees should not have stopped in the midst of the quotation. Their authority continues as follows:

"The trustee must clear the transaction of every shadow of suspicion, and if he is an attorney he must show that he gave his client who sold him full information and disinterested advice. Lord Eldon admitted that this exception was a difficult case to make out, and it may be said generally that it is difficult to find a case where such a transaction has been sustained. Any withholding of information or *ignorance of all his rights* on the part of the *cestui,* or any inadequacy of price, will make such a purchaser a constructive trustee."

We cite and will quote from many authorities, federal, state and text-books and especially refer to

2 Pomeroy Eq. Jur., sec. 968;

1 Perry on Trusts, secs. 109, 194, 195, 206, 318-20;

1 Elliott on Contracts, sec. 74;

1 Rowley on Partnership, secs. 342, 384, 400, 403;

Brooks v. Martin, 2 Wallace, 70-87;

Nelson v. Matsch (Utah), 1912 D Ann. Cases 1124;

Byrne v. Jones, 159 Fed. (8th C. C. A.) 321;

Michard v. Girod, 4 Howard 555.

The rule which applies to cases of law to the effect that the appellate court will not disturb the findings or judgment of a trial court, if there is substantial

evidence to support them, does not obtain in appeals from decrees in equity cases. In such cases the trial is *de novo*. It is held by all the federal courts that both law and fact will be reviewed, and while the weight given to the decision of the trial judge has been variously stated, we believe that the following clearly states the rule:

> "The finding of the trial judge is entitled to a consideration, and unless clearly against the weight of the evidence, or there was some error in the application of the law, it will not be disturbed on appeal; on the other hand, if the finding is clearly against the weight of the evidence, the appellate court in a procedure in equity will reverse it, as on appeal the facts as well as the law are open to consideration."
>
> Bush v. Bronson, 248 Fed. 383.

Even the Supreme Court will reverse the case on the facts in equity, although such facts have been "concurred in by two lower courts," if clearly erroneous.

> Texas & Pacific Railroad Co. v. Ry. Com., 232 U. S. 338.

From a fair consideration of the authorities, it would seem to be incumbent upon the appellant to establish that the trial court decree was clearly against the weight of evidence.

There is no serious conflict between our contention on this point and that of appellees, as witness appellees' SECOND POINT, at page 83 of brief No. 3, as follows:

"A finding of fact made by the trial court on conflicting evidence is presumptively correct and will not be disturbed in the absence of serious mistake in the consideration of evidence or error in application of the law."

Citing

G. N. Ry. Co. v. Pa. etc. Co., 242 Fed. 799.

This is not an ordinary case wherein the burden of proof was on appellant. Where confidential relations are shown and a contract proven wherein the managing partner had purchased a copartner's interest in partnership property, the whole transaction is presumptively fraudulent and voidable, subject to cancellation, and unless this presumption of fraud was overcome by appellees by clear and convincing testimony, the trial court erred in dismissing the bill.

It is this rule that we believe the trial court overlooked. At no place in his opinion does the trial court suggest that appellees had the burden of proof or that the ordinary rules of evidence did not apply. At no place does he suggest that the appellees were burdend with establishing the fairness of the transaction and that it was free from fraud; that all information in Day's possession necessary for Mrs. Cardoner to have formed a sound judgment as to value had been disclosed.

The case is treated as any ordinary one involving alleged fraudulent representation. In that character of case the burden of proof is upon the plaintiff to establish fraud by clear and convincing testimony; whereas in the present case, and those of like character,

the defendant has the burden upon him to prove, not only that the transaction was fair and free from fraud, but that all disclosures as to knowledge in possession of the purchaser were disclosed to the seller. At page 1321 of the record the court discusses the rule, but not the burden of proof.

Our burden in this court might be stated as follows, and we would endeavor to show:

THAT THE TRIAL COURT IS IN ERROR IN DISMISSING APPELLANT'S (PLAINTIFF'S) BILL, IN THAT IT CLEARLY APPEARS FROM THE EVIDENCE THAT THE DEFENDANT IN THE TRIAL COURT DID NOT MEET THE BURDEN UPON THEM TO OVERCOME THE PRESUMPTION OF CONSTRUCTIVE FRAUD BY PROVING: FIRST, THAT THE PRICE PAID FOR MRS. CARDONER'S PROPERTY APPROXIMATED REASONABLY NEAR TO A FAIR AND ADEQUATE CONSIDERATION; AND SECOND, THAT ALL INFORMATION IN POSSESSION OF EUGENE R. DAY WHICH WAS NECESSARY TO ENABLE MRS. CARDONER TO FORM A SOUND JUDGMENT AS TO THE VALUE OF WHAT SHE SOLD TODAY WAS COMMUNICATED BY THE FORMER TO THE LATTER.

We take it to be self-evident that if there is not some substantial testimony to show that the required disclosures were made to Mrs. Cardoner by Eugene R. Day; or if the testimony showed he was in possession of facts the law contemplates should be disclosed, and it is not shown they were so disclosed, or if the evidence does not show they were so disclosed, then we have complied with the rule as to one of the requisites upon which said sales are held to be invalid.

All the disclosures made by Eugene R. Day to Mrs. Cardoner are set out in narrative form in our original brief, at pages from 29 to 64, inclusive. It is claimed by appellees (brief No. 3, page 94) that we did not set out all such information, referring to certain testimony there copied (pages 86 to 94, brief No. 3) which we are glad for the court to consider. We do not believe that any member of this court will be able to say that he has information from which he could make a sound judgment as to the value of the Hercules Mining Company's property, after reading all such testimony. Indeed, it is so admitted by appellees in their brief (brief No. 2, page 45 *et seq.)*, from which we copy as follows:

"It is unreasonable to suggest and absurd to contend that they should have gone through all the records of the Hercules Mining Company, extending over a period of 16 years' operation, to disclose to Mrs. Cardoner a tabulated mass of figures such as is found on page 102 of appellant's brief. He did not have the information in his possession and he never acquired the information as manager to enable him to furnish such figures to appellant, and he could not from his knowledge supply the data from which such figures were made. In fact, it took weeks of effort and labor by most skillful and learned accountants to assemble the facts for the answers to the interrogatories, and upon which some accountant must have spent much time and effort in tabulating such figures. Mrs. Cardoner or anyone she might designate had a free access to the records of the Hercules Mining Company as they had, and he was not required to hire men especially fitted for such work to compile data she refused

to have compiled for herself. The situation would have been different if he had denied her access to the books, the mill or the mine.

"It is believed no decision can be found in which there has been decreed a rescission of sale, where there was not exhibited in the case a willful misrepresentation of the conditions or a deliberate concealment of facts exclusively within the knowledge of the trustee. Hence the authorities and text cited in appellant's brief are wholly inapplicable to the case at bar. The pivotal point in such cases being an intentional false representation or a knowing concealment of material facts within the possession of the purchaser."

We call the court's attention to the last paragraph of the above quotation, from which it will be seen that appellees' theory of the law is entirely erroneous. The fact is, there need be no intentional fraud, intentional misrepresentation or intentional concealment. It is sufficient if full and complete disclosures were not made, whatever might have been the reason therefor.

If the first paragraph of the above quotation correctly states the fact, it is quite evident that Mrs. Cardoner was not in possession of all the facts necessary for her to make and form a sound judgment as to the value of this property. The "weeks of effort of skilled and learned accountants" referred to by appellees resulted in furnishing the facts and figures upon which the experts based their estimates of value given at the trial of this suit. Mr. Burbridge stated that he was not content with the facts and figures so furnished by answers to interrogatories, but that he

made a personal inspection, examination and observation in the mine, and further stated:

"I should have measured up the width of the stopes. That is about the only thing I would do which I did not do in this particular case, and the reason I did not do it in this case is that my view of the correct method of determining the value was to assume a like production for the future of the mine as its past."

It is not pretended by Eugene R. Day that he disclosed to Mrs. Cardoner any information having in view the purchase of the mine from her. Indeed, he testified that he had not thought of buying the mine until approached by Allen on the 18th or 20th of October, 1916. He stated:

"She wanted to know all the property interests because she was coming into it, and she wanted to know all about it." [Rec. p. 724.]

"She was interested in knowing every detail concerning the business. She wanted to know every particular thing." [Rec. p. 730.]

But at these times she was not trying to sell nor he to buy, if his testimony is given credence. Under such circumstances, no doubt, he would be justified in disclosing to her only such information as was in his mind or memory.

We attempted, at page 42 of our original brief, to lay down certain rules for determining the value of this property, but our ignorance was roundly scored by learned counsel for appellees (brief No. 3, pp. 142-3). In our original brief we stated:

"We believe from all the testimony in this case with reference to value that the following are among the

most essential facts necessary to determine the value of the mine, stated in the order of their importance:

1. Net income year by year and particularly the present income.
2. The dividends declared year by vear and aggregate.
3. The previous history of the mine and its production.
4. The conditions as they appear within the mine on the date value is sought to be proven.
5. The history, production and depth of mines of like character in the same locality or district."

To these views appellees do not agree, and charge all our manifold errors and miscalculations as to values to our ignorance thus displayed, and proceed to make their "five points" in lieu of ours, as follows (Appellees' brief No. 3, pp. 142-3):

"We are confident the following items, in their respective order, are those which should be considered in determining the value of the mine:

1. The district where located and the history of neighboring mines.
2. The extent, mineral content, permanency and location of ore bodies.
3. The cost and means of extraction, transportation, treatment, and the amount of mineral content that can be saved and marketed.
4. The amount of ore extracted and the amount of ore in reserve.
5. Approximate value of probable ore."

(It is quite evident that their items Nos. 1, 2, 3 and 4 correspond respectively with our 5, 4, 1 and 3; and that the only additional element of value suggested

by them is their No. 5, which we believe is included in our Nos. 1 and 2.)

In comparing our "five points" with theirs, we find largely a distinction without a difference, and cannot agree that "it accounts for the false view the appellant has of the case." (Appellees' brief No. 3, p. 143.) The view we have may be "false," but it is still our view notwithstanding appellees' criticism. We believe that each of appellees' "five points" are essential to determine value. We only stated that ours were "among the most essential facts." Now, assuming appellees to be correct, as far as they went, WHAT DISCLOSURES DID EUGENE R. DAY MAKE TO MRS. CARDONER, OR WHAT FACTS DID HE FURNISH HER FROM WHICH SHE COULD HAVE DETERMINED VALUE IF IT WERE NECESSARY FOR HER TO HAVE THE INFORMATION CONTENDED FOR BY APPELLEES AS SET OUT ABOVE?

With reference to their first point, he told her that the Tiger-Poor Man had paid to 1500 or 1800 feet below the creek level—and that was all.

He gave her absolutely no information as to the extent, mineral content, permanency and location of ore bodies.

With reference to the cost and means of extraction, transportation, treatment and the amount of mineral content that could be saved and marketed, he practically gave no information. He claims he told her "about the Wallace mill," that they had bought an interest in North Port Smelter and Pennsylvania Refinery, and that they could see the ore from the time it was knocked down in the mine until marketed, all

of which was a great advantage to the company. But the essential facts as to cost, value of these properties to the company and the amount of the mineral content that could be saved and marketed, were not mentioned.

The amount of ore that had been extracted was not mentioned. Neither was there any mention made of the amount of ore in reserve, or any information given from which these facts could be determined.

There was not the slightest attempt to approximate the value of the probable ore.

Appellees insist that information necessary to determine these five items was required in arriving at value. It is not remotely pretended that such information was furnished or disclosed by Eugene R. Day. Assuming appellees' position to be correct, it was the duty of Day to disclose this information to Mrs. Cardoner, and it should have been disclosed as soon as he began negotiations for the purchase of the property. The law requires this; appellees admit as much, and they admit she was not furnished any such facts. (Appellees' brief No. 2, p. 45.) If appellees are correct in their position that it was not incumbent upon Eugene R. Day to disclose fully the partnership conditions as reflected by the books of the company, notwithstanding it would have been some trouble to him, then the Supreme Court, in Brooks v. Martin, and the Circuit Court of Appeals, in Byrne v. Jones, 159 Fed. 321, were very much in error in their conclusion.

The appellees, in their brief No. 3, beginning at page 147, under the heading, "Mrs. Cardoner's Knowledge," set out in 15 numbered paragraphs the infor-

mation it is claimed she possessed at the time she sold her interest in the mine. If every word of this was supported by substantial evidence, it would fall far short of such knowledge as appellees contend is needed to determine value. (Brief No. 3, p. 143.) We make the following criticisms of these fifteen paragraphs:

Paragraph 1 is not based on any testimony. [Rec. p. 455.]

Paragraph 2 is not based on any testimony. She was asked if she did not come at such a date, and answered, "I suppose so. I don't remember the date." [Rec. pp. 459-60.]

Paragraph 4 is a correct statement.

Paragraph 5 is a correct statement.

There is no testimony to show she filed a divorce suit. She was asked, "You remember, Mrs. Cardoner, commencing a suit for divorce against Mr. Cardoner, do you not?" to which she answered, "It was not divorce." [Rec. p. 461.]

Paragraph 7 is correct except that she went to Spain in 1906. The amounts stated are correct for the end of the year.

Paragraph 8 is erroneous. The evidence shows that Mr. Cardoner received the statements.

Paragraph 9 is correct.

Paragraph 10 is misleading. She was not in "constant touch" with anyone. She had one conversation with Paulson about the mine. She denies talking about it to Hutton; he says he talked to her once about it. Allen claims to have had conversations about the mine, but no one testified to having discussed with her "the

improvements made at the mine from 1906 to 1916." Nor is there any substantial evidence of "reliable information."

Paragraph 11 is correct as to her knowledge that the mine was worked down to the Hummingbird tunnel. The remainder is misleading. The experts, as well as Day, based the life of the mine on the depth below the creek level, and not upon the depth of the mine from the apex.

Paragraph 12 is to an extent correct, based upon Day's testimony. He testified that he told Mrs. Cardoner that the Tiger-Poor Man had been worked 1500 or 1800 feet below the No. 5 tunnel, that the Hercules had cut "good ore" at the 200, below the No. 5 tunnel, and had penetrated the ore at the 410 level; that by owning the smelter and refinery they got all that was in the ore.

Paragraph 13 is misleading. There is no evidence that she knew any of the matters stated therein.

Paragraph 14 is not a statement of knowledge of any fact.

Paragraph 15 is not based upon any evidence in the case.

Taking everything to be true that was testified to by appellees' witnesses, the information possessed by Mrs. Cardoner would have fallen far short of sufficient from which value could be determined. She was an old lady of 64 years, had been out of touch with America for 11 years, justifiably suspicious, uneasy about her property rights, and in just the frame of mind in which she needed the disinterested advice of

Eugene R. Day, the trusted manager of her interests, and her husband's long-time partner and friend. Allen's testimony shows he was interested more in obtaining a commission for the sale of the property than in giving her disinterested advice. His own testimony shows that he encouraged the sale, using very doubtful methods in doing so, under the circumstances. Paulsen, a member of the Hercules partnership, refused to advise her or to estimate the value of her property. Hutton claims to have told her that the property was worth $4,000,000; a statement he could not have believed himself, and which was calculated to push her on to an improvident sale. Allen was not a mining man, nor capable of giving advice as to the value of this property, and disclaimed that he could do so. [Rec. p. 637.] Mrs. Cardoner was not particularly familiar with mining [Allen's testimony, p. 654]; her husband was a strong, forceful man, who had managed his own affairs. [Rec. 654.] Judge Wood did not claim to be an expert and stated that he did not have sufficient experience to be able to give advice as to value. [Rec. p. 714.] According to the testimony, the only persons who claimed to have talked to her were Paulsen, Hutton, Allen and Eugene R. Day. From the above it is quite evident that she did not have capable disinterested advisers. The most capable, Allen, like any other broker (which the court found him to be [Rec. p. 1375], was using the usual broker tactics, talking the property down to bring about a sale, that he might earn a commission. The only person capable of giving the advice needed was

trying to buy the mine. He claimed he did not first approach her to buy; she claims he did. The court concluded that Day was the first to mention the purchase of the property. [Rec. p. 1390.] Whatever may be the fact, we find Day bargaining for the property, and before buying he never made the slightest disclosure to her as to the business conditions of the company, nor did he disclose to her any information for determining value, having in view at the time his purchase of the property. He simply went into it to buy as cheaply as he could, first offering $275,000 and then going up to $350,000, an increase of 30 per cent over his first offer. In regard to this he said:

"Q. It was your purpose and intention, when Mr. Allen first came to you on or about the 20th of October, to buy this woman's interest for the very least money you could get it for. A. I wanted to buy it for as reasonable a price as I could.

Q. Just as cheap as you could get it? A. I didn't want to pay more than it was worth at any time.

Q. But you would have taken it for $275,000, wouldn't you? A. Yes.

Q. That is to say, you were making as good a trade with her as you would try to make with me? A. I would try to make the best trade I could make." [Day's testimony, rec. p. 807.]

This does not look like good faith and a disposition to pay a fair price. A man who would thus trade with a partner, an old woman, sick who had no disinterested, capable advisers, would not likely disclose, or want to disclose, all the knowledge he possessed so she could form a sound judgment as to value. It

would be against his intention "to make the best trade he could make" to give her this information, and it was not given to her. It is this very spirit that the law condemns, and for these selfish reasons a full disclosure is required. There is no compatibility between making a full disclosure, as the law requires, and the making of the best trade possible. They are inconsistent and will not occur in the same transaction. No disclosures were made, or pretended to have been made, with a view of having her form a sound judgment as to value. As stated by Day, he traded with her as he would have traded with the attorney who was questioning him. All disclosures claimed to have been made by Day were made long before October 20, the day which he testified negotiations for purchase began. We have copied in our original brief, from pages 29 to 39, a complete narration of all statements made by Day to Mrs. Cardoner about the property as testified to by him, none of which did he claim were made with a view of purchase.

Then we believe that we have met the requirements of the law in this case, in that it clearly appears that the appellees failed to meet the burden on them to prove that Day had disclosed all material facts within his knowledge or possession from which Mrs. Cardoner could make a sound judgment as to value; that on the other hand, the affirmative testimony of appellees proves this was not done; and further, it is not claimed by appellees that it was done, but it is claimed by them that it would have been unreasonable to have expected

Day to furnish such facts. (Appellees' brief No. 2, p. 45.)

We call the court's attention to the case of Ledington v. Patten, decided by the Supreme Court of Wisconsin and reported in 86 N. W. p. 571, for a full discussion of this question. At page 580 the court said:

> "The policy of the law is to regard all transactions of a contract nature, between a trustee and his *cestui que trust*, whereby the former obtains the interest of the latter, or some part thereof, in the subject of the trust, as presumptively fraudulent and void at the election of the latter. If such a transaction be permitted to stand, it is upon condition that the trustee satisfies the court, fully and completely, that the *cestui que trust* received a full equivalent for that which he parted with and that the transaction was to his advantage. The burden of proof in such a case rests upon the trustee to clearly free himself from the imputation of fraud arising from the facts, and the same is true where a person deals to his own advantage with a person with whom he sustains relations of trust and confidence. The obligation of disclosure, and to protect the interests of the weak or trusting, is the same in one case as in the other. 'It is the language of all the authorities that such a transaction is always scrutinized in a court of equity with a watchful eye, and will not be sustained to the disadvantage of the *cestui que trust* except upon the most complete and satisfactory evidence of good faith and fair dealing on the part of the trustee.' (Puzey v. Senier, 9 Wis. 376."

Also, at page 581, the court said:

> "The trustee must show, 'by unimpeachable and convincing evidence, that the beneficiary, being *sui juris*, had full information and complete understanding of all the facts concerning the property and the transaction itself, and the person with whom he was dealing, and gave a perfectly free consent, and that the price paid was fair and adequate, and that he made to the beneficiary a perfectly honest and complete disclosure of all the knowledge and information concerning the property possessed by himself or which he might, with reasonable diligence, have possessed.' 2 Pom. Eq. Ju., sec. 958. 'A trustee may buy from the *cestui que* trust, provided there is a distinct and clear contract, ascertained to be such after a jealous and scrupulous examination of all the circumstances, providing that the *cestui que trust* intended the trustee should buy, and there is no fraud, no concealment, no advantage taken by the trustee of information acquired by him in the character of trustee,'—that the trustee took no advantage whatever of his situation, and that he gave his *cestui que trust* all the information which he possessed. Lord Elden in Coles v. Trecothick, 9 Ves. 247."

In the case of Brown v. Jones, 159 Fed. 321, the Circuit Court of Appeals for the Eighth Circuit had a like matter before it, and among other matters stated:

> "The first question is, was Byrne entitled to a specific performance of his contract of purchase of March, 1905? for an affirmative answer to that question avoids all others. The answer to it is conditioned by the relation of the parties to

each other under the contract of 1892, and by the nature of the disclosure which Byrne made to Jones of the management, condition, and value of the property before that contract was made. For wise reasons of public policy, the law peremptorily forbids everyone who, in a fiduciary relation, has acquired information concerning, or interest in, the property or the business of his correlate, to use that knowledge or interest or to take advantage of his correlate's ignorance in the matter, to the detriment of the latter, or for his own benefit. Trice v. Comstock, 57 C. C. A. 646, 649, 121 Fed. 620, 623, and cases there cited. A trustee or an agent may purchase the trust property directly from his *cestui que trust, sui juris,* or principal, on condition that the latter intends that the former shall buy, that the former discloses to the latter, before the contract is made, every fact he has learned in his fiduciary relation which is material to the sale, that he exercises the utmost good faith, that no advantage is taken by misrepresentation, concealment of, or omission to disclose, important information gained as trustee or agent, and that the entire transaction is fair and open. Michoud v. Girod, 4 How. 555, 11 L. ed. 1076; Brown v. Cowell, 116 Mass. 461, 465; Mills v. Mills (C. C.), 63 Fed. 511; Steinbeck v. Bon Homme Mining Co., 81 C. C. A. 441, 447, 152 Fed. 333, 339. But the condition is inexorable. Any omission by the trustee or agent to disclose any fact material to the sale learned by him as trustee or agent, any material misrepresentation, concealment, or other disregard of this condition, renders the sale and the contract for it voidable at the election of the *cestui que trust* or principal. Beach on Trusts and Trustees, sec. 518; Saunders

v. Richard, 35 Fla. 28, 16 South. 679; Cornish v. Johns, 74 Ark. 231, 240, 85 S. W. 764; Thweatt v. Freeman, 73 Ark. 575, 580, 84 S. W. 720; Coles v. Trecothick, 9 Vesev Jr., 234, 246; 2 Pomeroy's Equity Jurisprudence, sec. 958."

In the case of Gilbert and O'Callaghan v. Anderson, 66 Atl. 926, the Chancery Court of New Jersey said:

"Complainants and defendant bore to each other a trust relationship as partners, and, when defendant purchased the interest of complainants in the partnership business, it was his duty as a partner and manager of the business purchased to make a full and complete disclosure of the condition of the business in every way essential to an adequate knowledge on the part of complainants as to what they were selling; and the burden is upon the defendant to establish the fact that he performed his duty in that respect."

In the case of Nelson v. Matsch, decided by the Supreme Court of Utah and reported in 110 Pac. 865, and Ann. Cas. 1812 D. 1242, the court says:

"One of the fundamental principles of the law of partnership is that partners stand in a fiduciary relation to each other, and that it is the duty of each partner to observe the utmost good faith towards his copartners in all dealings and transactions that come within the scope of the partnership business. 22 Am. & Eng. Ency. Law 114, and cases cited. And, where one partner by false representations obtains an undue advantage over a copartner in transactions connected with the partnership business, equity will grant the defrauded party relief. 'Partners occupy a relation

of trust and confidence within the meaning of the rule, and in dealing with each other each is bound to disclose all material facts known to him and not known to the other.' 14 Am. & Eng. Ency. Law 70. The rule is well stated in Story on Partnership (7th ed.), sec. 172, in the following language: 'Good faith not only requires that every partner should not make any false misrepresentations to his partners, but also that he should abstain from all concealments which may be injurious to the partnership business. If, therefore, any partner is guilty of any such concealment and derives a private benefit therefrom, he will be compelled in equity to account therefor to the partnership.' So in Parsons on Partnership (4th ed.), sec. 151, it is said: 'From the requirement of perfect good faith, it follows that no partner must deceive his copartners, for his benefit and their injury, either by false representations or by concealments. Thus, if he persuades them into any course of business, or to any single transaction, by these means, and losses occur, he must sustain them or compensate for them. So, if he proposes to buy of them the whole or any part of their share of their business, and by any false statement or prevarication, influences them to enter into an arrangement to effect his wishes, it will not be obligatory on them.' In Smith on Fraud, sec. 114, the author says: 'Where a confidential relation exists and there is any misrepresentation, or concealment of a material fact, or any just suspicion of artifice, or undue influence, courts of equity will interfere and pronounce the transaction void, and, as far as possible, restore the parties to their original rights.' To the same effect are the following authorities:

Lindley on Partnership (2 Am. ed.), sec. 486; Pomeroy v. Benton, 57 Mo. 531; Goldsmith v. Koopman, 152 Fed. 173, 81 C. C. A. 465; Brooks v. Martin, 2 Wall. 70, 17 L. ed. 732; Holmes v. Gilman, 138 N. Y. 369, 34 N. E. 205, 20 L. R. A. 566, 34 Am. St. Rep. 463."

In McAlpine v. Millen, 104 Minnesota, 289, 300, the court said:

"In dealing with each other, partners occupy a position of trust, and must exercise the most scrupulous good faith towards each other."

The Supreme Court of the United States, in the case of Michoud v. Girod, 4 Howard 502 to 566, largely determined the rights of a fiduciary or trustee to purchase the property of a beneficiary, and this case has been approved by the same court, as well as by many other courts, and cited in a vast number of cases, as will be seen by reference to 3rd Roses's Notes, Revised Edition, pages 1090 to 1101, the latest cases approving this decision being Magruder v. Druder, 235 U. S. 120, and United States v. Carter, 217 U. S. 308; Lane v. Cotton Mills, 232 Fed. 422; and many cases from both federal and state courts.

This case so fully and completely sets out the doctrine that we contend for that we quote from it largely, although on account of its great length we can only quote a little of the matter in point. This was a case of the purchase of property by an executor. The court held that such purchases are absolutely void, and not voidable, as held by Judge Deitrich in the present case. We quote as follows, pages 555, 556 and 557:

"It is also affirmed, in Church v. Marine Insurance Company, 1 Mason 341, that an agent or trustee cannot, directly or indirectly, become the purchaser of the trust property which is confided to his care. We scarcely need add, that a purchase by a trustee of his *cestui que trust, sui juris*, provided it is deliberately agreed or understood between them that the relation shall be considered as dissolved, 'and there is a clear contract, ascertained to be such, after a jealous and scrupulous examination of all the circumstances, and it is clear that the *cestui que trust* intended that the trustee should buy, and there is no fraud, no concealment, and no advantage taken by the trustee of information acquired by him as trustee,' will be sustained in a court of equity. But it is difficult to make out such a case, where the exception is taken, especially when there is any inadequacy of price, or any inequality in the bargain. Coles v. Trecothick, 9 Ves. 246; Fox v. Mackreth, 2 Bro. Ch. 400; Gibson v. Jeyes, 6 Ves. 277; Whichcote v. Lawrence, 3 Id. 740; Campbell v. Walker, 5 Id. 678; Aycliffe v. Murray, 2 Atk. 59. And therefore, if a trustee, though strictly honest, should buy for himself an estate from his *cestui que trust*. and then should sell it for more, according to the rules of a court of equity, from general policy, and not from any peculiar imputation of fraud, he would be held still to remain a trustee to all intents and purposes, and not be permitted to sell to or for himself. 1 Story Com. on Equity 2d ed.), 317; Fox v. Mackreth, 2 Bro. Ch. 400; S. C., 2 Cox Ch. 320, 327.

"In New York there has been no relaxation of it, since the decision in the case of Davoue v.

Fanning, 2 Johns (N. Y.) Ch. 252. It is a critical and able review of the doctrine, as it has been applied by the English courts of chancery from an early day, and has been received, with very few exceptions, by our state chancery courts, as altogether putting the rule upon its proper footing. Indeed, it is not too much to say, that it has secured the triumph of the rule over all qualifications and relaxations of it in the United States, to the same extent that had been achieved for it in England by that great chancellor, Lord Elden. Davoue v. Fanning was the case of an executor for whose wife a purchase had been made by one Hedden, at public auction, *bona fide*, for a fair price, of a part of the estate which Fanning administered, and the prayer of the bill was, that the purchase might be set aside, and the premises resold. The case was examined with a special reference to the right of an executor to buy any part of the estate of his testator. And it was affirmed, and we think rightly, that if a trustee, or person acting for others, sells the trust estate, and becomes himself interested in the purchase, the *cestui que trusts* are entitled, as of course, to have the purchase set aside, and the property re-exposed to sale, under the direction of the court. And it makes no difference in the application of the rule, that a sale was at public auction, *bona fide*, and for a fair price, and that the executor did not purchase for himself, but that a third person, by previous arrangement with the executor, became the purchaser, to hold in trust for the separate use and benefit of the wife of the executor, who was one of the *cestui que trust*, and who had an interest in the land under the will of the testator. The

inquiry, in such a case, is not whether there was or was not fraud in fact. The purchase is void, and will be set aside at the instance of the *cestui que trust*, and a resale ordered, on the ground of the temptation to abuse, and of the danger of imposition inaccessible to the eye of the court. We are aware that cases may be found, in the reports of some of the chancery courts in the United States, in which it has been held that an executor may purchase, if it be without fraud, any property of his testator, at open and public sale, for a fair price, and that such purchase is only voidable, and not void, as we hold it to be. But with all due respect for the learned judges who have so decided, we say that an executor or administrator is, in equity, a trustee for the next of kin, legatees, and creditors, and that we have been unable to find any one well-considered decision, with other cases, or any one case in the books, to sustain the right of an executor to become the purchaser of the property which he represents, or any portion of it, though he has done so for a fair price. without fraud, at a public sale. Why should the rule be relaxed in the case of persons most frequently exposed to the temptations of self-interest, who may yield to it more readily than any others, with a larger impunity, if the day of equitable retribution shall ever come for those who have been defrauded? Is it not better that the cause of the evil shall be prohibited, than that courts of equity shall be relied upon to apply the remedy in particular cases, by inquiring into all the circumstances of a case, whether there has or has not been fraud in fact? Is the rule to be relaxed, in the case of executors, in respect to all persons in-

terested in the estate, or only to such of them as are *sui juris?* And if only to those who are *sui juris*, why in case of an executor as to such persons, when the rule has never been relaxed by any court of equity to permit purchases by any other trustee or agent of one who is *sui juris?* Shall it be relaxed in cases of those who are interested in the estate, and who are not *sui juris* or minors? Then other remedies must be devised to protect their interests than that which experience has shown to be alone efficacious. It is, that when a trustee for one not *sui juris* sees that it is absolutely necessary that the estate must be sold, and he is ready to give more for it than any one else, that a bill should be filed, and he should apply to the court by motion, to let him be a purchaser. This is the only way he can protect himself. There are cases in which the court will permit it. Campbell v. Walker, 5 Ves. 478; 13 *Id.* 601; 1 Ball & B. 418."

Lindley on Partnership, eighth edition, at page 364 says:

> "If one partner knows more about the state of the partnership accounts than another, and, concealing what he knows, enters into an agreement with that other, relative to some matter as to which a knowledge of the state of the accounts is material, such agreement will not be allowed to stand."

The matter is well treated in Volume 2, Pomeroy's Equity Jurisprudence, in sections 955 to 959, inclusive, to which we call the court's attention, and from which we quote in part as follows:

"Sec. 956. It was shown in the preceding section that if one person is placed in such a fiduciary relation towards another that the duty rests upon him to disclose, and he intentionally conceals a material fact with the purpose of inducing the other to enter into an agreement, such concealment is an actual fraud, and the agreement is voidable without the aid of any presumption. We are now to view fiduciary relations under an entirely different aspect; there is no intentional concealment, no misrepresentation, no actual fraud. The doctrine to be examined arises from the very conception and existence of a fiduciary relation. While equity does not deny the possibility of valid transactions between the two parties, yet because every fiduciary relation implies a condition of superiority held by one of the parties over the other, in every transaction between them by which the superior party obtains a possible benefit, equity raises a presumption against its validity, and casts upon that party the burden of proving affirmatively its compliance with equitable requisites, and of thereby overcoming the presumption. * * *"

"Sec. 957. There are two classes of cases to be considered, which are somewhat different in their external forms, and are governed by different special rules, and which still depend upon the single general principle. The first class includes all those instances in which the two parties consciously and intentionally deal and negotiate with each other, each knowingly taking a part in the transaction, and there results from their dealing some conveyance, or contract or gift. To such cases the principle literally and directly applies. The transaction is not necessarily voidable, it may

be valid; but a presumption of its invalidity arises, which can only be overcome, if at all, by clear evidence of good faith, of full knowledge, and of independent consent and action. * * *"

"Sec. 958. * * * In the second place, where the trustee deals, with respect to the trust, directly with his beneficiary: A purchase by a trustee from his *cestui que trust*, even for a fair price and without any undue advantage, or any other transaction between them by which the trustee obtains a benefit, is generally voidable, and will be set aside on behalf of the beneficiary; it is at least *prima facie* voidable upon the mere facts thus stated. There is, however, no imperative rule of equity that a transaction between the parties is necessarily, in every instance, voidable. It is possible for the trustee to overcome the presumption of invalidity. If the trustee can show, by unimpeachable and convincing evidence, that the beneficiary, being *sui juris,* had full information and complete understanding of all the facts concerning the property and the transaction itself, and the person with whom he was dealing, and gave a perfectly free consent, and that the price paid was fair and adequate, and that he made to the beneficiary a perfectly honest and complete disclosure of all the knowledge or information concerning the property possessed by himself, or which he might, with reasonable diligence, have possessed, and that he has obtained no undue or inequitable advantage, and especially if it appears that the beneficiary acted in the transaction upon the independent information and advice of some intelligent third person, competent to give such advice, then the transaction will be sustained by a court of equity. * * *"

There is some question raised as to whether or not Eugene R. Day was required to disclose to Mrs. Cardoner information he did not obtain as manager of the mine. In the first place, he had been manager of the mine for many years and lived in that community and it would have been hard to have determined what information he obtained as such manager and what not. Referring to the case of Brooks v. Martin, 69 U. S. 70, and to the case of Dongan v. McPherson A. C. 197, it will be seen that it is immaterial from what source he obtained his information if he actually had the information or material information in the premises it was his duty to disclose it, otherwise he would not be acting in the utmost good faith.

We then call the court's attention to 1 Perry on Trusts, section 194, which we quote in full, as follows:

> "Sec. 194. 'Lord Hardwicke's 'third species of fraud may be presumed from the circumstances and condition of the parties contracting; and this goes further than the rule of law, which is, that fraud must be proved, not presumed.' At law, fraud must be proved; but in equity there are certain rules prohibiting parties bearing certain relations to each other from contracting between themselves; and if parties bearing such relations enter into contracts with each other, courts of equity presume them to be fraudulent, and convert the fraudulent party into a trustee. And herein courts of equity go further than courts of law, and presume fraud in cases where a court of law would require it to be proved; that is, if parties within the prohibited relations or conditions contract between themselves, courts of equity will avoid the

contract altogether, without proof, or they will throw upon the party standing in this position of trust, confidence, and influence, the burden of proving the entire fairness of the transaction. Thus, if a parent buys property of his child, a guardian of his ward, a trustee of his *cestui que trust,* an attorney of his client, or an agent of his principal, equity will either avoid the contract altogether, without proof or it will throw the burden of proving the fairness of the transaction upon the purchaser; and, if the proof fails, the contract will be avoided, or the purchaser will be construed to be a trustee at the election of the other party. The ground of this rule is, that the danger of allowing persons holding such relations of trust and influence with others to deal with them is so great that the presumption ought to be against the transaction, and the person holding the trust or influence ought to be required to vindicate it from all fraud, or to continue to hold the property in trust for the benefit of the ward, *cestui que trust,* or other person holding a similar relation."

We further call the court's attention to section 178 of the same book and quote as follows:

"If a person standing in a special relation of trust and confidence to another has information concerning property, and contracts with the other, and does not disclose his exclusive knowledge, the contract may be avoided, or he may be held as a constructive trustee. * * *"

Also, we refer to section 195, at page 318 of the same book, and quote as follows:

"* * * But there are exceptions to the rule, and a trustee may buy from the *cestui que* trust,

provided there is a distinct and clear contract, ascertained after a jealous and scrupulous examination of all the circumstances; that the *cestui que trust* intended the trustee to buy, and there is fair consideration and no fraud, no concealment, no advantage taken by the trustee of information acquired by him in the character of trustee. The trustee must clear the transaction of every shadow of suspicion, and if he is an attorney he must show that he gave his client, who sold to him, full information and disinterested advice. Lord Eldon said he admitted that the exception was a difficult case to make out. And it may be said generally that it is difficult to find a case where such a transaction has been sustained. Any withholding of information, or ignorance of the facts or of his rights on the part of the *cestui*, or any inadequacy of price, will make such a purchaser a constructive trustee. * * *"

We quote as follows from Rowley on Partnership, Vol. 1, section 341:

"Owing to the peculiarly confidential and hazardous nature of partnership, one of the first and most essential rights of each partner is that his copartners exercise the greatest good faith in all partnership matters. * * *"

Also from section 342:

"The partnership relation is one of trust and confidence, and the members of a firm sustain a trust relation toward each other with reference to partnership matters. Partnership is 'eminently a relation of trust. * * * There is no stronger fiduciary relation known to the law than that of a copartnership, where one man's property and prop-

erty rights are subject to a large extent to the control and administration of another. * * *"

We quote section 403 as follows:

"Should one partner die the responsibility devolves upon the survivor of exercising an equal or even greater diligence and honesty in relation to the property, owing to the close relations and good faith supposed to exist between them while associated together. Practically all the duties owing by one partner to another during the life of both continue after the death of the other partner, excepting those which are personal in nature, and there are many added duties devolving upon the surviving partner. This question will be discussed at length in a subsequent chapter."

IV.

Some question has been raised as to the relation between Harry Allen and Mrs. Cardoner. The record shows [see testimony of Allen, p. 600] that he became connected with this matter solely upon a statement made by Mrs. Cardoner to him to the effect that she would like for him to sell her property and wondered if Eugene R. Day would buy it and he volunteered to see Day. These are the only instructions he received from Mrs. Cardoner. He was not advised by her to offer the property to any one else and statements that she had anything to do with threats to sell to any other person made by Allen, which Day did not take seriously [Record p. 795], were not even known to her. But however this may be it was held in the case of Taylor v. Ford, 131 Cal. 440, that the threat of a

partner to sell his interest to a stranger was not coercion in law.

V.

The next proposition is to determine whether or not Mrs. Cardoner received a price that approximated near the value of this property. The testimony with reference to the value of the Hercules partnership property may be classified as follows:

1. Estimates of value by persons interested in the property, options given ten and eleven years before the sale and the fact that the one-sixteenth interest was sold for $250,000 eight or ten years before;

2. The previous history of the mine, including its net and gross incomes, the income it was making at the time of the sale and immediately before, together with the estimated life of the mine;

3. The testimony as to the mineral content made by experts with the estimated length of time it would require for extraction and the probable net profits returned;

4. To any estimate made as above must be added the value of certain properties owned by the company, the cash on hand and the value of ore extracted from the mine and sold, for which returns were subsequently received.

The lower court based his opinion largely upon the testimony, which comes under the first classification.

The manner in which the court arrived at his conclusion that Mrs. Cardoner was paid a reasonable price

for the property, we believe shows beyond any doubt that he failed to grasp the proper viewpoint, notwithstanding the many interesting suggestions made by him which he insists entered into the value of this property. The trouble is that he failed to apply the law as laid down in Brooks v. Martin, Perry on Trusts, Elliott on Contracts, Pomeroy's Equity Jurisprudence, and cases heretofore quoted to the effect that the burden of proof was upon the appellees to establish that the transaction was fair and that a price approximating the real value was not only given, but that it was proven by appellees that Day gave such price, that the transaction was presumptively fraudulent; that appellees were burdened with proving not only those things, but such facts must be established by clear and convincing testimony. The court says:

"The ultimate question with which we are concerned, of course, is not how much ore there was in the mine but what the property was reasonably worth upon the market in cash, that it should have reasonably sold for under the circumstances."

The court goes into an elaborate argument as to the uncertainties of mining, cost of extracting, treating and marketing, uncertainties of price at which the property would have sold, uncertainties of the estimates of the present worth of the ores in the earth, how long it will take to market and turn into cash, the effect of the war upon the mining industry, and whether or not this country would enter the war and what effect that would have. In other words, he surrounded the mining properties with a cloud of uncer-

tainties and speculative conditions from which he concluded that the price given approximated near its worth. Had this mining property all the speculative conditions and uncertainties attached to it mentioned by Judge Dietrich in his opinion, how would it be possible for him to determine whether or not the appellant had received near its value when she sold it? From his premises, there could be but one conclusion reached, and that conclusion would be to the effect that there was no testimony in this case upon which the court could base or determine the value of the mine, and there being no reliable evidence of value and the burden of proof being upon the appellees, decree should be entered against them.

It is instructive to read the reasoning by which the court arrived at the conclusion that a fair price had been paid for the property. We copy from his opinion [Record pp. 1389-1391] as follows:

"In view of these admitted uncertainties and the wide variance between the estimates of the experts, manifestly no safe conclusion as to the reasonable value of the property in October, 1916, can be predicated upon their testimony alone, and therefore I refrain from setting forth an analysis of it. It is of weight and value in connection with the other evidence upon the subject, and I give it consideration in that connection. What, in the main, is the other evidence? Day, though not an expert geologist or mining engineer, and perhaps without experience in marketing mines, was an intelligent, practical operator, with intimate knowledge of the general condition in and about this property. His judgment is entitled to some weight,

and I am satisfied that he would not have given more for the plaintiff's interest. Some point is made that he bargained with her and sought to secure the property for a much lower figure. But it is not material to the present inquiry to determine whether or not he had the right to deal with her as an equal, if it be assumed that she had all the information that he possessed. It might very well be held that if she knew as much about the mine as he, he had the right to buy her interest at such price as she was willing to take. But be that as it may, whether we condemn or justify his conduct in seeking to get the property for less than he finally paid for it, the fact is that he added to his first offers until he reached the sum of $312,500, exclusive of the cash on hand, or a price upon the basis of $5,000,000.00 for the assets, exclusive of the cash on hand, and there declined to go further. Through Allen the plaintiff sought to get him to increase his bid, but Day definitely declined, and I think was unwilling to pay more. His testimony now as to what he considers the property worth, as well as that of his brothers, Harry L. Day and Jerome J. Day, is in the nature of expert testimony, and, coming from an interested source, is, of course, to be considered in the light of such interest. But if for that reason we put aside entirely their opinion testimony, and impute to that of the opposing engineers equal weight, what have we? We have Day's decision at the time not to pay more. We have the testimony of the two disinterested witnesses Paulsen and Hutton, the one that the property was worth no more than was paid, and the other that it was worth less. We have no instance where a larger price was ever paid or offered for any interest in the property. We have the sale of the Reeves one-sixteenth interest seven or eight years before, when undoubtedly the

actual value was greater than in 1916, for $250,000. We have the unaccepted offers of the owners to sell the whole property in 1905 for $4,000,000 and in 1906 for $6,000,000. If it be said that to Day the interest had a special value because it gave 'the Days' control of the mine, the obvious reply is that to an independent investor, generally speaking, so small an interest would be less saleable, and that therefore its market value, when offered alone, could hardly be said to be equal to one-sixteenth of the market value of the property as a whole. Upon consideration of the entire matter, my conclusion is that not only was the plaintiff informed of the known conditions and facts bearing upon the value of the property, but that the price paid approximated the reasonable market value of her interest, and was probably as much as she could have obtained from any other source, and in any view of the bearing of the question of value upon the issue here, an approximation of the true value is all that is required."

The court substantially finds the value of the mine from the testimony of Hutton and Paulsen, part owners, who merely made an estimate of what it was worth in round figures, that a like fractional interest had been sold eight or ten years before for $250,000; and upon the fact that in 1906 an option had been given for six million dollars, and in 1905 an option had been given for four million dollars. In other words, the expert testimony of Burbridge and Greenough was never analyzed by the court; and this with the past history of the mine, its valuable accessory property, tremendous income, future possibilities and probabilities, large cash reserve and ore in transit and sold, not referred to by the court, was the only real testimony

from which any determination could have been made as to the value of this mine. We have endeavored in our original brief to show that the Greenough estimate based upon calculations that were sound, were approximately near the value of the mine, and that the Burbidge estimate, if he had taken the proper values of ore, would have been almost identical with that of Greenough.

Considering the law of this case to the effect that the burden of proof was upon the appellees, and certainly in estimating the value the testimony should be taken most strongly against them, and if there was any fraud, *or if it was not clearly shown that the value of the mine approximated near what Mrs. Cardoner received therefor, the decree should be reversed.*

As will be seen by reference to the foregoing quotation from the court's opinion, the evidence of witnesses as to past history, dividends and past production, large income for 1916 and 1917, value of other property connected with the Hercules and owned by the company, the Northport Smelter, Pennsylvania Refinery, equipment and mill and other permanent and recently made improvements at a cost of over $2,000,000, nearly $400,000 cash, and $1,048,864 ore sold and for which payment was thereafter made, etc., and many other elements of value hereinafter referred to were lightly considered by the court in determining value and these principally for the purpose of showing the speculative and uncertain character of such evidence. Likewise the testimony of the expert engineers was disposed of with, "Such estimate of course is only one of the im-

portant factors and when we consider all of them we find that the margin of uncertainty is so great that any opinion of the value must be necessarily speculative." Then further on in his opinion [p. 1398]:

"In view of these admitted uncertainties and the wide variance between the estimate of the experts manifestly no safe conclusion as to the reasonable value of the property in October, 1916, can be predicated on their testimony alone and, therefore, I refrain from setting forth an analysis of it. It is of value and weight in connection with the other evidence upon the subject, and I give it consideration in that connection."

The court then considered, in his opinion, the other evidence as follows:

(a) The fact that Eugene Day refused to pay more than $312,500.00 for the one-sixteenth interest.

(b) The opinion of the Day brothers and their partners, Paulsen and Hutton, to the effect that the amount paid Mrs. Cardoner was approximately the value of the mine.

(c) The fact that a sale of the one-sixteenth interest in the mine was made seven or eight years before for $250,000.00 by a man named Reeves.

(d) That certain options were given by the owners of the mine in 1905 and 1906 unaccepted, for $4,000,000 and $6,000,000 respectively.

The court did not attempt to analyze the past history of the mine, the present conditions, nor the estimate of experts; had he done so, he would have found that all three were capable of being surprisingly reconciled

and to force a conclusion of a value of approximately $10,000,000.00.

In our opinion, the lower court, able judge that he is, was led into error by treating this transaction as though the burden of proof was not upon the appellees to show by clear and convincing testimony that all necessary disclosures had been made and that a fair price had been given, but that he rather treated it in effect as an ordinary suit for rescission, based upon false representations, not involving fiduciary relations.

Had he analyzed or seriously considered the testimony as to value under our classifications 2 and 3 he must have reached a different conclusion. Let us analyze the estimates of value upon which the court based his decision:

First, the testimony of Hutton, the partner of Day, who testified that the value was approximately $4,000,000 and that he so told Mrs. Cardoner in the summer or fall of 1916. [Record p. 672.]

Counsel for appellees in their brief number three, at page 94 said that Mrs. Cardoner admitted having seen Mr. Hutton on October 29th, 1916. This is entirely erroneous, as will be seen from her testimony [Record pp. 404-8], where she denies having seen Hutton at any time subsequent to May. It would have made no difference, however, as her interest had been sold prior to October 29th. Hutton based his testimony on the estimated depth of ore of 500 to 700 or 800 feet below the Hummingbird Tunnel (it was 535 feet at the time he testified). [Record p. 678.] This very fact destroys all value of his testimony. No expert witnesses

of the appellees estimated the future depth of the mine at less than 1800 or 1900 feet, below No. 5 level, from which no ore had been removed.

If the sums of the cash on hand (after deducting all debts) of $370,520.00, and value of the ore in transit of $1,048,868.14, equalling $1,371,388.14, was deducted from this $4,000,000 estimate, there would remain $2,628,611.86 as value for the ore in the mine and all other property belonging to said partnership; the latter had cost approximately $2,000,000. This was a less sum by $300,000 than the net income in 1916, and a still less sum than the income for 1917. The appellees' witnesses, Burbridge and Eugene R. Day [Record pp. 901-2], each in 1918, at the trial and at a time when they knew a great deal more about the mine, and after the shaft had been driven some 600 or more feet below the Hummingbird Tunnel, estimated the life of the mine at about ten years from October 28, 1916, and the depth of the ore at 1900 feet.

Second: The testimony of Mr. Paulsen [Record p. 686] to the effect, in his opinion, that the appellant received approximately the value of her interest, will be best answered by our own estimate taken from the testimony further on.

Third: The testimony to the effect that options were given in 1904 and 1905 for $4,000,000 and $6,000,000 respectively, and that about the same time the Reeves' one-sixteenth interest was sold for $250,000 and that no other like amount was offered for any interest, may be considered together. The fact that since said options and sales more than $10,000,000 net profits have

been taken from this mine and the value placed on the property at this sale was approximately equal to that of the options, is sufficient to show that this testimony was valueless in determining the present worth.

From an investor's standpoint it was not the same property, nor would any purchaser place the slightest probative value on such testimony. Proof of options given ten years before on an actively worked mine that had subsequently paid ten million dollars in dividends would certainly not establish value nor would it be reliable evidence in any sense of the word. This evidence was admitted over the objection of appellant and its admission was the basis of our first assignment of error.

Fourth: The fact that there was no instance wherein a larger price was paid for any interest in the mine is not significant, when the owners who testified on the subject said that their interests were not for sale; besides there is no evidence that any interest had been for sale since the Reeves interest was sold ten years prior.

Fifth: The three Day brothers testified that Mrs. Cardoner received all her property was worth. This must be considered along with the fact that they are interested parties and that no person buying or selling would have given any particular weight to such testimony in view of the figures that we shall hereafter present. To show what slight probative force the testimony of Eugene R. Day with reference to value should be given we call the court's attention to the fact that he testified that up to October 28, 1916, the

mine had paid $10,000,000. (In fact, it had paid $12,000,000. See appellees' brief number two, top of page 68; and this did not include ore in transit amounting to $1,048,648.14, altogether $13,000,000.) That he estimated the mine had been three-fifths worked out, leaving a remainder of two-fifths yet to be worked; that inasmuch as three-fifths had paid $10,000,000, the remaining two-fifths would pay $4,000,000. It is quite evident to any one that if three-fifths paid $10,000,000, two-fifths would pay $6,666,666. [Record pp. 753-4.]

Appellees' witness Burbridge estimated that the value of ore should be discounted at compound interest at six per cent for a period of four and seven-tenths years to establish the present value, and said amount so discounted is $4,995,268—to this add the ore in transit, $1,048,868; cash, less debts, of $370,521, and other property hereafter estimated at $2,014,528, and the total value would be $8,329,285.00. This is a fair deduction from Eugene R. Day's own testimony.

Our Estimates of Value Based on the Testimony.

(a) A person undertaking to purchase this property would probably first determine the value of such outside property as was more or less connected with the mine, the protecting property and new improvements made for future operations at and below the Hummingbird tunnel, the cost of which is as follows:

Real estate [Rec. p. 1365]	$14,500
Timber land [Rec. p. 1365]	4,250
Pennsylvania refinery [Rec. p. 93]	87,500
Wallace Mills [Rec. p. 93]	150,891

Dwellings [Rec. p. 94]	11,403
Accounts receivable [Rec. p. 94]	29,400
Northport smelter [Rec. p. 97]	288,289
Republic mine [Rec. p. 1367]	46,500
Mining stock [Rec. p. 93]	288,239
Lodes and patents [Rec. p. 1366]	30,929
Machinery and equipment [Rec. p. 93]	93,553
Hoist [Rec. p. 93]	29,065
No. 5 surface improvement [Rec. p. 94]	50,720
Wallace mill [Rec. p. 94]	150,891
Power line [Rec. p. 94]	26,180
Mine lighting plant [Rec. p. 1366]	25,116
No. 5 compressor [Rec. p. 1367]	6,484
No. 5 timbering [Rec. p. 1367]	120,016
No. 5 shaft [Rec. p. 1367]	65,057
Sawmill [Rec. p. 1366]	15,124
No. 5 level [Rec. p. 1366]	514,804
No. 5 picking plant [Rec. p. 1360]	30,022
Assay office [Rec. p. 1366]	4,311
No. 5 shaft [Rec. p. 1367]	31,246
Total	$2,014,532

These items were paid for out of the profits of the mining company and have nothing to do with the cost of previous mining (more than $8,000,000 had been expended and charged off for that purpose), but only contains net construction expenditures available for the future development of the mine.

It is not contended by us that at the end of the mining operations the cost of this property will be returned out of the sale thereof. This could not be. *But it is*

claimed that this property will not have to be duplicated; that it has been paid for out of the earnings of the mine; that the future earnings (it being assumed by Burbridge that the mine is only 52 per cent worked out) will be increased by approximately this amount, and whatever salvage there may be can be added for still greater dividends.

The foregoing property, that cost over two million dollars, paid for out of the gross earnings, is substantially all of such expenditures (except their maintenance) that will ever be needed [Greenough's testimony, Rec. p. 1096]. He states that the only additional cost of like improvements will be sinking the shaft, which would be about $100,000, if it would cost about in the same ratio as the first 535 feet, which was $31,246.

(b) The next property is cash on hand,

which was [Rec. p. 95]	$649,359
Less debts of [Rec. p. 95]	278,839
Would be	$370,521

(c) The next item of value would be the ore in transit of $1,048,864 [Rec. p. 95], which had been sold, was returning in cash every day, the last of which would be returned within ninety days [Rec. p. 783]. At most, this should be discounted at 6 per cent for forty-five days, said discount being $7,866,

leaving a balance of $1,041,999 as the present cash value of said ore.

The contention of appellees [see record, pp. 1110 to 1123] that it was necessary to have $600,000 cash on hand all the time and besides to have a million tons of ore in transit, and sufficient funds to keep it going, misled the court, as the record shows. [Rec. pp. 1121 *et seq.*]

The fact is, the company had on hand cash enough ($649,359) to put $2,000,000 worth of ore in transit. This is proven by the following tabulated statement of the business of the Hercules Company taken from the monthly statements introduced in evidence, to-wit:

Date	Cash on Hand	Dividends	Expense	Page Rec.
Aug., 1915,	$257,000	.....	$ 25,000	1166
Sept., 1915,	146,000	.....	82,000	1171
Oct., 1915,	158,000	$ 32,000	100,000	1144
Nov., 1915,	157,000	32,000	134,000	1191
Dec., 1915,	242,000	32,000	138,000	1199
Jan., 1916,	343,000	32,000	110,000	1153
Feb., 1916,	400,000	64,000	131,000	1136
Mar., 1916,	507,000	64,000	134,000	1209
Apr., 1916,	470,000	96,000	132,000	1319
May, 1916,	538,000	128,000	159,000	1329
June, 1916,	767,000	288,000	130,000	1337
July, 1916,	670,000	504,000	129,000	1345
Aug., 1916,	375,000	256,000	157,000	1353
Sept., 1916,	101,000	.....	83,000	1359
Monthly av.	365,714		118,143	

Monthly average expense for ten months, 1916, 130,555

The average cash on hand for the fourteen months previous to the sale was $365,714. On September 1, 1916, there was cash on hand, $101,000. The actual average expense of running the mine for the previous fourteen months was $118,143 a month, and had averaged $130,555 per month during the previous ten months of 1916, and was only $93,000 for the month of September before the sale. *Compare this table with the testimony of Mr. Ramstead, the company accountant.* [Rec. pp. 1121-2.]

It will thus be seen that the cost of putting ore in transit was approximately $130,000 a month, whereas the average monthly shipments of ore were $369,000 in 1916, showing a profit of nearly 70 per cent. Burbridge testified "they could get along with $200,000." [Rec. p. 1120.] They did "get along with $101,000" in September, 1916.

From the above it will be determined that the cash on hand was ample to care for all expenses and that the ore in transit was equivalent to cash.

VALUE OF PROPERTY EXCLUSIVE OF ORE IN MINE.

Property, etc.,	$2,014,532
Cash,	370,521
Ore in transit,	1,041,999
Total,	$3,426,052

(d) The next matter to be determined would be the probable value of the ore in the ground. In this, testimony of the expert witnesses is necessary. Greenough, the appellant's witness, testified that it would approximate 2,210,000 tons. Appellees make elaborate calculations to show that Greenough's estimate should be reduced to 1,812,722 2/9 tons. (Appellees' brief No. 3, p. 132.)

We will accommodate them further and accept the estimate of their own witness, Mr. Burbridge, at 1,575,600 tons. [Rec. p. 903.] This estimate, we believe to be too conservative, but under the considerations confronting us in this case we have determined to present the whole case from the evidence of appellees alone.

On October 28 the testimony shows the following facts:

The net profits from 1908 to 1912 averaged $3.27 per ton, while from 1913-1915, inclusive, the average was $7 per ton, although the average price of metals was less in the latter period and cost of labor and material greater. The expenditures so made upon the property as heretofore outlined would be justified in increased efficiency. The following tables will show the average price of lead and silver for many years previous to this sale:

MARKET VALUE OF SILVER AND LEAD.

	Lead, per Hundred	Silver, per Ounce, in Cents.
1901,	$4.36	
1902,	4.10	

1903,	4.26		
1904,	4.32	1904,	57.22
1905,	4.705	1905,	60.35
1906,	5.66	1906,	66.79
1907,	5.33	1907,	55.32

Period of Level Values:

1908,	4.236	1908,	52.86
1909,	4.30	1909,	51.50
1910,	4.35	1910,	53.49
1911,	4.46	1911,	53.40
1912,	4.485	1912,	60.83
1913,	4.40	1913,	59.79
1914,	3.87	1914,	54.81
1915,	4.675	1915,	49.685

1916,	6.83	1916,	65.66

The probable depth of the remaining ore was 1900 feet [Rec. p. 902]; that the ore bodies were found to be as expected at 200 and 410 feet, respectively, below the Hummingbird tunnel when cut by the shaft or drift [Rec. p. 839]; that the probable life of the mine as estimated by appellees' witness Burbridge was 9.4 years [Rec. p. 903]; that in 1916 the net profits were $9.40 per ton; that the net profits for the life of the mine averaged $7.29 per ton; that the net profits from 1908 to 1915 (a period of even prices) averaged $5.33 per ton; that the net profits from 1912-1915 (a period of low prices in metals, but with better mining facilities) averaged $7 per ton.

Basing estimates upon these several values as to mineral content and net profits, we arrive at the following estimated value of the mine:

1,575,600 tons of ore at $7 per ton equals $11,029,200, which, discounted at 6 per cent compound interest for 4.7 years Burbridge's theory [Rec. p. 904] would be	$8,240,039
To which add the value of other property,	3,427,039
Making a total of	$11,667,039

The above is based on years of lowest average metal value, but after equipment had been greatly improved (1913 to 1915, inclusive).

Valuing the net profits at $9.40 per ton, being the average profit of 1916, the result would be for ore in the ground, $16,506,400, which, discounted at 6 per cent compound interest for 4.7 years, would be $12,321,914. To which add the value of other property of $3,427,039, the total value would be $15,808,953.

Estimating the value of the ore at $5.33 per ton, being the average value of the years from 1908 to 1915, being that of low even value, the result would be $8,398,000, which, discounted at 6 per cent for 4.7 years, would be $6,270,000; to which add $3,427,039, other property, would be $9,697,039. By taking the valuations from 1908 to 1915, being that of the lowest average period, it seems that our estimated value of nearly $10,000,000 on this basis is reasonable, when it is considered that that basis was made upon the mineral content and the rate of discount and

term of years established by appellees' witness Burbridge; the only difference being it is based on net profits, treating 1908 to 1915 as "normal years" instead of 1908 to 1912, as Burbridge did.

The value of the Hercules mining property, based upon Burbridge's estimate of 1,575,600 tons of ore in place, valued from lowest to highest price of ore during the life of the mine, to which is added the value of other property owned by the company, the cash on hand, and the ore in transit discounted, is shown by the following figures:

Value of ore per ton	Estimated net value of ore after discounted 6% for 4.7 years	Value of property and improvements	Cash and value of ore in transit discounted	Estimated value of all properties
$3.00	$3,531,200	$2,014,532	$1,412,520	$7,957,252
5.33	6,270,000	2,014,532	1,412,520	9,696,052
7.00	8,240,000	2,014,532	1,412,520	11,667,039
7.29	8,435,300	2,014,533	1,412,520	11,861,052
9.40	12,321,914	2,014,532	1,412,520	15,808,953

The $3 per ton net is value placed on future production by Burbridge. [Rec. p. 904.]

The $5.33 is the average net profit per ton from 1908 to 1915, inclusive, period of level values of metals.

The $7 is average net profit per ton of 1913 to 1915, inclusive, the period of low price, but high efficiency.

The $7.29 is the average net profit per ton for the whole life of the mine prior to October 28, 1916.

The $9.40 is average net profit per ton for 1916, the period of highest prices.

There were many physical facts proven, contradicting estimates of value, made by the owners of the mine, which, we believe, clearly show that appellees did not meet the burden of proving that the consideration paid approximated reasonably near the value; and we refer the court to the following facts established by the evidence:

(1) The net profits to date of sale had been $11,915,886.74 [rec. p. 72], to which should be added $1,048,864.14 for ore sold and payment for which was later received [rec. p. 95], and profits of $272,676.66 made on the stock of the Selby Smelting and Lead Company [rec. p. 96]; cash on hand, $370,561; making a total net profit of $13,607,948.54, on October 28, 1916.

(2) That the great expense of purchasing protecting property, smelter, refinery, mill, power, other mines, approximating a million dollars (see page 58 of our original brief), would not have to be duplicated.

(3) That equipment, surface improvements, tunnels, shafts, power hoists, cars, lighting, timbering, tools, etc., that cost over a million dollars would not have to be duplicated, which would increase the percentage of profits for the future of the mine.

(4) There was a net profit of $2,368,682.90 earned to October 28, 1916, for that 10 months. [Rec. p. 77.]

(5) That the ore taken out during November and December, 1916, was approximately 23 per cent of the

amount taken out in the previous 10 months, which would make the net profits for 1916 approximately $3,000,000.

(6) The testimony shows that the year of 1917 was a more remunerative year than 1916, hence must have netted more than $3,000,000. [Rec. p. 854.]

(7) The net income for 1917, $3,000,000 or more, added to that for November and December, 1916, which was approximately $550,000, equalled about the value placed on the mine; or in other words, the Days had their money back within about 14 months after the purchase; the sale value being $5,000,000, less ore in transit valued at $1,048,864.14, or $3,950,135.85.

(8) Up to October 28, 1916, during the previous life of the Hercules, there had been mined 1,777,951 tons of ore, which was sold for $21,985,472.84 (including the $1,048,864.14, ore in transit), the gross average price per ton being $12.37.

(9) The estimated contents of the mine on October 28, 1916, as made by the defendants' expert witness, Burbridge, was 1,575,600 wet tons of crude ore, or equal to 48 per cent of the mine, and at the same average value of the previous 16 years would bring $19,490,172.

(10) There was ore shipped and not paid for (equal to cash) in 1916, to October 28, of $1,048,-864.14. [Rec. p. 95.]

(11) At the time of sale, metals were at the highest, with no immediate prospect of lower prices.

(12) The net profit for 1916 was 73¾ per cent of the value placed on the mine and all Hercules Com-

pany property, excepting only the cash on hand and ore in transit, sold and equivalent to cash.

(13) There was property, equipment and new improvements of a greater value than $2,000,000, paid for out of profits that would not have to be duplicated.

(14) Net profits for the future would be very much greater proportionately because large expenditures made would not have to be duplicated, and the mine was completely equipped — "One of the best equipped mines in the Couer d'Allene."

(15) The average mineral content of milling ore in 1916 was greater than for the previous life of the mine. That is, the lead content was 10.88 per cent and the average was 9.85 per cent for 16 years. The average silver content was 8.73 ounces per ton for 1916, and that of the previous 16 years was 8.60 ounces per ton.

(16) Excluding the high-grade ore mined and especially picked during the first five years, the ore has not become baser to a material extent, as claimed by appellees.

(17) The average tonnage per vertical foot to October 28, 1916, was 808. At that date the tonnage per vertical foot was estimated at 1400.

In the argument of the case we called special attention to the slight of hand performance with figures indulged in by witnesses for appellees, and referred to at pages 108 and 109 of appellees' brief No. 3, *whereby it was sought to reduce the value of the ore in transit*

amounting to $1,048,864, to the sum of approximately $177,000, it being stated in said brief that appellees' interest therein would be $11,111 1/9, this multiplied by 16 to give the full value of said ore is $177,884.

We are somewhat dazed in trying to understand just how this was brought about. We know the ore was of the value stated; we know that all operating expenses and cost of extraction had been paid for; we know that the mine was out of debt and had cash on hand; we know that the net profits in this ore amounted to nearly $700,000 (see tabulated statements, p. 102 appellant's original brief), and yet, like Caesar after death, it was reduced to this little measure. The problem is left for the court to solve.

It is such argument as the above that has reduced the value of this mine from more than ten million dollars to that of from two and a half to four million dollars, contended for by the appellees.

How Appellees' Witnesses Reduced Value.

First. The cash on hand, about $650,000, was discounted at 6 per cent for 4.7 years. [Rec. p. . . .]

Second. The $1,048,864, ore in transit, was treated by a process of reduction that brought it down first to $400,000, and then to $177,000. (Appellees' brief No. 3, pp. 108-9.)

Third. The value of the estimated ore in the mine was placed at $3 net profit per ton; when the average for 16 years has been $7.29. The average for 1916 was $9.40; the average for the period of level (so-called

normal) prices, 1908 to 1915, was $5.33; and the average for the years 1913 to 1915, the years of low level prices of metal, and when mining facilities had reached a high standard, was $7 per ton.

Fourth. The ignoring of $2,000,000 invested in property out of the earnings that would not have to be duplicated.

By the above methods—none of which bears the light of reason—the appellees managed to estimate the value of the property at approximately what Mrs. Cardoner received, or less.

There is nothing reasonable or fair in such estimates. It is our judgment that the net profits should be valued at the average value of the previous life of the mine. Certainly metals were at the highest price known for years at the time the trade was made, with every prospect of a long continuance of such values.

Conditions October 28, 1916.

The court in his opinion stated that we would be bound by conditions as they appeared October 28, 1916, which is correct; and these are the conditions, partly:

(1) The mine was approximately 52 per cent worked out.

(2) It had earned over $13,000,000.

(3) It had earned $2,368,682 net, in 1916 to October 28.

(4) The gross output had sold for over $21,000,000.

(5) It was one of the best equipped mines in the country.

(6) Its incidental property, equipment and development at No. 5 level had cost $2,000,000.

(7) It had cash on hand, less debts, of $370,000.

(8) It had ore in transit of $1,049,000.

(9) Prices of lead and silver were high, and silver going up all the time.

(10) A great war was raging, causing high prices.

(11) The average net profit in 1916 was $9.40 per ton; for the life of the mine, $7.29; for the period of level prices, from 1908 to 1915, $5.33 per ton.

(12) No interest had been sold or option given since 1906, since which time the mine had made net profits of about $10,000,000.

(13) There was no apparent change in productiveness on that date.

(14) The net profits were at said date about 70 per cent of the gross income.

(15) It would reasonably appear that future net profits would be greater on account of splendid equipment and facilities.

(16) Ore at 410 feet below No. 5 level had been cut through, and was all that ever was expected—was "good ore," likewise at 200 level.

With the above conditions apparent October 28, 1916, could it be said that the value was not greatly in excess of the price given?

With special attention to the fact that we are basing our estimates of value on Burbridge's testimony (except as to the probable future value of metals, which

is not a matter of expert testimony), and including value of property he ignored; that the mine was paying over $3,000,000 net annually at the date of sale; that prices of metals were at the highest; that there had been no material loss in mineral content; that the Days probably got their money back in 14 months; that the estimated life of the mine was 9.4 years; that the evidence shows unfair methods used to estimate value by appellees; that only 52 per cent of the mineral content had been removed; that the estimated value, less ore in transit, was less than $4,000,000—and many other facts referred to in this brief, we confidently believe that we have presented a case clearly showing that the appellees did not meet the burden of proof and introduce evidence from which the court was justified in holding that the price paid for Mrs. Cardoner's interest in the mine and property approximated reasonably near its value.

We believe that it is not possible to say that the appellees have proven the mine to be worth less than $10,000,000. We further believe that by a fair preponderance of the testimony we have shown the value of the Hercules Company's property to be worth over $10,000,000.

(We have added at the end of this brief under the heading, "Statistics and Estimates Deduced from the Evidence," certain information compiled from the evidence and referred to at various parts of this brief. It is believed this will be of convenience to the court.)

VI.

Purchased by Eugene Day While Executor of Damian Cardoner's Estate.

Eugene R. Day purchased said property while executor of the estate of Damian Cardoner. We call the court's attention to the case of Michand v. Girod, 4 Howard pp. 502-566, quoted from under a previous heading in this brief. This case holds that an executor cannot purchase property of his trust unless authority be given by order of court duly entered; and states:

> "And it makes no difference in the application of the rule that the sale was at public auction, *bona fide* and for a fair price; and that the executor did not purchase for himself but that a third person by previous arrangements with the executor became the purchaser to hold in trust for the separate use and benefit of the wife of the executor. * * * The inquiry in such a case is not whether there was or not fraud in fact. The purchase is void and will be set aside at the instance of the *cestui que* trust."

The mere fact that the property had been delivered to Mrs. Cardoner by Day, the executor, under an order of distribution would not give him any the less the advantage. It is our belief that both the general law as quoted in the case just mentioned (see more complete quotation in another place in this brief) and the statutes of Idaho contemplated that an executor should be removed from such temptation as came to Eugene R. Day; and that such transactions between an executor and heir are and ought to be held absolutely void.

We see no reason why he should be permitted to reap all the advantage of his knowledge and position as executor by distributing the property and then immediately buying it. The opportunity to overreach and defraud would be equal in either case. The purchase of Day, while executor, should avoid this sale.

VII.

Conclusion.

We believe that it is clearly shown appellees did not meet the burden of proving that Eugene R. Day disclosed all the information in his possession that the law required him to disclose in purchasing Mrs. Cardoner's property, so that she could have formed a sound judgment as to the value of the property so sold to him.

We believe it is further clearly shown that appellees did not meet the burden of proving that the price paid for the Hercules property by Eugene R. Day to Mrs. Cardoner approximated reasonably near its value; but on the other hand that the evidence shows the price paid was grossly inadequate.

It is further clearly shown that Eugene R. Day bought said property from Mrs. Cardoner (placed it in his sister's name, ostensibly to deliver to himself and others later) while he was executor of the estate of Damian Cardoner, deceased. Such property was a part of said estate and had been distributed only a few days before, and such sale, in our opinion, should be held to be void.

For these and others reasons stated in this brief, and in our original brief, it is respectfully submitted that this case should be reversed and rendered for appellant; or else should be reversed and a new hearing ordered.

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(See compilations and tabulations of facts following this.)

SUPPLEMENTAL.

Pages 131, 132 and 135 to 138 inclusive of appellee's brief No. 3, were reprinted and substituted after filing. While copies of the substituted pages had been delivered to solicitors for appellant, they were not before them at the time their reply brief was written, which was hurriedly done.

FURTHER "PROCESSES OF REDUCTION."

At the original page 132 appellees had reduced Greenough's estimate of tonnage only a matter of half million tons to 1,812,122 tons (too large for practical purposes). So in the substituted page the "process" is continued, and the tonnage is further reduced to 1,326,722; about a million tons below Greenough's estimate and 350,000 tons below Burbidge's estimate.

At pages 135 to 138 certain arbitrary problems are worked out by a sort of inverted "reduction process," by using $5,000,000 as purchasing capital and calculating interest upon it at arbitrary rates and time.

ERRORS.

1. The interest should be figured at 6%, the legal rate. The mere fact that Greenough estimated the profit in a mining venture should be high, would not effect intrinsic value. (Burbidge's testimony, Rec. p. 932.)

2. The time, 13.75, 12 and 10 years is practical-

ly and theoretically wrong and opposed to the evidence. Greenough's final estimate for the life of the mine was 7.7 years. (Rec. p. 1100.)

3. The computations are made on the theory that no returns of any kind will be made until the end of the life of the mine, when in fact the returns would be greatest at the beginning and lessen gradually to depletion, resulting in greatest returns in the first years. Thus 261,968 tons was mined in the first 10 months of 1916, at which rate the tonnage (1,575,600 Burbidge estimate) would be mined out in 5 years, though Burbidge estimates it at 9.4 years. The principal should be credited with each year's returns and thus reduced; or the time reduced by adopting the time it will be assumed one-half will be returned. Practically this would be sooner than one half the life of the mine, but Burbidge assumed this and we followed in our brief. (Rec. p. 906-7.) The time possibly should be near one-third the estimated life of the mine.

Upon the Burbidge theory these calculations should have been based on a time of one-half 7.7 years (Rec. p. 1100) which would be 3.85 years, and not 13.75, 12, or 10 years.

MORE REDUCTION PROCESS.

At pages 140-1, two problems are based on "dividends," when it should be on "net profits"; on $400,000 value of ore in transit, when it should be $1,048,868; on assumption that ore at the apex

equalled in volume ore at the No. 5 level, which is not true.

GREENOUGH ESTIMATE.

Greenough's estimate fairly analyzed would result as follows:

Ore in mine, $10,750,000 (Rec. p. 1059), discounted at 6% for 3.85 years (half of 7.7 years) would be	$ 8,644,662.
Ore in transit	1,048,868
Cash less debts	370,000
Incidental property, and improvements at No. 5 level	2,014,533
Total value	$12,078,063

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ADDENDUM.

Statistics and Estimates Deduced from the Evidence.

Cost of Incidental Properties and New Improvements.

Real estate [Rec. p. 1365]	$14,500
Timber land [Rec. p. 1365]	4,250
Pennsylvania refinery [Rec. p. 93]	87,500
Wallace mills [Rec. p. 93]	150,891
Dwellings [Rec. p. 94]	11,403
Accounts receivable [Rec. p. 94]	29,400
Northport smelter [Rec. p. 97]	288,289
Republic mine [Rec. p. 1367]	46,500
Mining stock [Rec. p. 93]	288,239
Lodes and patents [Rec. p. 1366]	30,929
Machinery and equipment [Rec. p. 93]	93,553
Hoist [Rec. p. 93]	29,065
No. 5 surface improvement [Rec. p. 94]	50,720
Wallace mill [Rec. p. 94]	150,891
Power line [Rec. p. 94]	26,180
Mine lighting plant [Rec. p. 1366]	25,116
No. 5 compression [Rec. p. 1367]	6,484
No. 5 timbering [Rec. p. 1367]	120,016
No. 5 shaft [Rec. p. 1367]	65,057
Sawmill [Rec. p. 1366]	15,124
No. 5 level [Rec. p. 1366]	514,804
No. 5 picking plant [Rec. p. 1360]	30,022

Assay office [Rec. p. 1366]	4,311
No. 5 shaft [Rec. p. 1367]	31,246
Total	$2,014,532

ORE REMOVED FROM MINE.

1,777,591 tons. [Rec. p. 902.]

ORE REMAINING IN MINE.

(Burbridge's estimate): 1,650,849 tons.
(Greenough's estimate): 2,210,000 tons.

GROSS RETURNS.

The gross returns to October 28, 1916, were $20,-972,610, to which add $1,048,864 ore in transit, upon which returns had not been made, making a total of $21,021,474.

NET PROFITS.

The net profits (appellees' brief No. 2, pp. 67-68) were $12,019,128; to which add profits on ore in transit amounting to $680,000, would be $12,699,128.

COST OF EXTRACTION.

The cost of extraction to October 28, 1916, was $8,322,346.

Operations From August, 1915, to September, 1916

Date	Cash on Hand	Dividends	Expense	Page Rec.
Aug., 1915,	$257,000	.....	$ 25,000	1166
Sept., 1915,	146,000	.....	82,000	1171
Oct., 1915,	158,000	32,000	100,000	1144
Nov., 1915,	157,000	32,000	134,000	1191
Dec., 1915,	242,000	32,000	138,000	1199
Jan., 1916,	342,000	32,000	110,000	1153
Feb., 1916,	400,000	64,000	131,000	1136
Mch., 1916,	507,000	64,000	134,000	1209
Apr., 1916,	470,000	96,000	132,000	1319
May, 1916,	538,000	128,000	159,000	1329
June, 1916,	767,000	288,000	130,000	1337
July, 1916,	670,000	504,000	129,000	1345
Aug., 1916,	375,000	256,000	157,000	1353
Sept., 1916,	101,000	.....	93,000	1359
14 months,	$5,120,000		$1,654,000	
Average per mo.,	365,714		118,143	
Average 1916, 10 months,			130,555	

Eugene R. Day's Estimate.

Day based his estimate on the assumption that the mine had paid $10,000,000; that it was three-fifths worked out and two-fifths remained [rec. p. 754], which he valued at $4,000,000, stating that "two-fifths of $10,000,000 was $4,000,000."

His Errors.

If mine had paid $10,000,000 when three-fifths worked out, the remaining two-fifths would be $6,666,666, and discounted at 6 per cent compound interest for 4.7 years would be	$4,995,268
Add ore in transit	1,048,868
Cash, less debts,	370,521
	$6,314,657
Add value of other property	2,014,528
	$8,329,285
But his estimate of $10,000,000 profit was $2,000,000 too low—so add $2,000,000, discounted at compound interest for 4.7 years at 6 per cent	1,500,000
Value	$9,829,285

Property Exclusive of Ore in Mine.

Incidental property	$2,014,528
Cash	370,521
Ore in transit	1,048,868
Total	3,433,917

Tonnage.

There had been removed from mine	1,777,591 tons of ore
Burbridge estimated the future tonnage at	1,575,600 " " "
Greenough estimated future tonnage at	2,210,000 " " "

The average net profit per ton during life of mine was $7.29
The average net profit per ton from 1908 to 1912, inclusive, 3.37
The average net profit per ton from 1908 to 1915, inclusive, was 5.33
The average net profit per ton for 1916 was 9.40
The average net profit per ton for years 1913, 1914, 1915 was 7.00
The average tons per vertical foot to October 28, 1916, 808
The tonnage per vertical foot, October 28, 1916, was 1,400
The average lead content for milling ore for life of mine was 9.85%
The average lead content for 1916 was 10.88%
The average silver content for milling ore for life of mine in ounces, per ton, was 8.60
The average silver content for milling ore for 1916 in ounces was 8.73
Greenough states the mill feed average was, in ounces 9.4
But he included zinc ore of about 600 tons.

MARKET VALUE OF SILVER AND LEAD.

Lead, per Hundred		Silver, per Ounce, in Cents.	
1901,	4.36		
1902,	4.10		
1903,	4.26		
1904,	4.32	1904,	57.22
1905,	4.705	1905,	60.35
1906,	5.66	1906,	66.79
1907,	5.35	1907,	65.32
1908,	4.236	1908,	52.86

1909,	4.30	1909,	51.50
1910,	4.45	1910,	53.49
1911,	4.46	1911,	53.30
1912,	4.485	1912,	60.83
1913,	4.40	1913,	59.79
1914,	3.87	1914,	54.81
1915,	4.675	1915,	49.685
1916,	6.83	1916,	65.66

The tonnage for ten months of 1916 to October 1 was 261,968.	
The above consisted of crude ore and concentrates amounting to	$ 70,871.61
The tonnage for November and December, 1916, was, in crude ore and concentrates	16,317.50
The tonnage for November and December, 1916, was 23% of the previous ten months.	
The net profits for 1916 up to October 28 was	2,368,682.90
The estimate for November and December is	544,807.06
Total for 1916	$2,913,489.96

The net profits for 1916 were 73¾ per cent of the estimated value of the mine, less cash and ore in transit.

The year of 1917 was a more profitable year than 1916.